

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANCISCO HERNANDEZ,
Petitioner,

vs.

TIM VIRGA, Warden,
Respondent.

Civil No. 12cv1682-BEN (DHB)

**REPORT AND
RECOMMENDATION OF
UNITED STATES
MAGISTRATE JUDGE RE
DENIAL OF PETITION FOR
WRIT OF HABEAS CORPUS**

Francisco Hernandez (“Petitioner”), a state prisoner proceeding *pro se* filed a Petition for Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. § 2254. (ECF No. 4.) Petitioner seeks relief from his August 2009 conviction in San Diego County Superior Court Case No. SCE286092 for two counts of robbery. He is currently serving a 37 years to life sentence in state prison. Petitioner raises four grounds for relief in his Petition: first, that the trial court improperly failed to order a competency hearing pursuant to California Penal Code § 1368; second, that the failure to *Mirandize* him violated his constitutional rights; third, that the trial court erred in failing to give a jury instruction on competency and intent; and fourth, ineffective assistance of counsel. Respondent filed an Answer opposing any habeas relief (ECF No. 19),¹ and Petitioner

¹ Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court’s electronic case filing system.

1 filed a Traverse (ECF No. 25) and supplemental memorandum in support of his
 2 Traverse (ECF No. 27.) The Court has reviewed the parties' pleadings, the record, and
 3 controlling law, and for the reasons discussed below, hereby **RECOMMENDS** the
 4 Petition be **DENIED**.

5 **I. BACKGROUND**

6 **A. Factual Background**

7 The following facts are taken from the unpublished California Court of Appeal
 8 Opinion in *People v. Hernandez*, Case No. D057059 (Cal. Ct. App. October 27, 2011).
 9 (Lodgment No. 7.) The Court presumes these factual determinations are correct
 10 pursuant to 28 U.S.C.A. § 2254(e)(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 340
 11 (2003) (finding factual determinations by state courts are presumed correct absent clear
 12 and convincing evidence to the contrary).

13 **i. The People's Case**

14 On September 27, 2008, at about 8:00 p.m., Abraham Moreno and
 15 Humberto Rodriguez were in Balboa Park watching a music video on
 16 Moreno's cell phone while seated in Moreno's parked car. Two men
 17 approached the car, one on each side. One of the men, who wore a red hat,
 18 red shirt and sunglasses, with the letters "SD" tattooed on his face—who
 19 Moreno and Rodriguez identified at trial as Ifopo—approached Moreno,
 20 who was sitting in the driver's seat, leaned through the open window, and
 21 said, "Look, I'm pretty fucked up. We can do this the easy way or the
 22 hard way." Ifopo lifted up his shirt, pulled a handgun from his waistband,
 23 and held it inside the car in front of Moreno. Ifopo told Moreno and
 24 Rodriguez to "give [him] all [their] shit." When Moreno and Rodriguez
 25 indicated they did not have anything to give, the man standing on the
 26 passenger side of the car—who Moreno and Rodriguez identified at trial as
 27 Hernandez—muttered that he was "going to fucking kill somebody." Ifopo
 28 then demanded Moreno's and Rodriguez's phones.

22 Moreno handed his phone, wallet and car keys to Ifopo. Rodriguez
 23 gave his phone and iPod to Hernandez but, as he was about to hand over
 24 his wallet, he asked Hernandez whether he could keep his identification.
 25 In response, Ifopo pointed his gun at Moreno's head and said, "This is
 26 your[] bud, right? You better shut the fuck up or I'm going to blow his
 27 brains out." Rodriguez told Ifopo and Hernandez to "take everything" and
 28 handed his wallet to Hernandez. Ifopo said he would leave the car keys
 by the bathroom and he would "blow [their] brains out" if they retrieved
 them before 10 minutes had passed. Moreno and Rodriguez sat in the car
 as Ifopo and Hernandez walked away.

After a few minutes, Moreno and Rodriguez got out of the car,
 unsuccessfully looked for the keys, and called 911 using the phone of a

1 passenger in a nearby limousine. The recording of the 911 call was played
2 for the jury.

3 In early October 2008, Detective Manuel Garcia of the San Diego
4 Police Department received a tip regarding a potential suspect with the
5 letters "SD" tattooed on his face. He showed Moreno and Rodriguez a
6 photographic lineup containing Ifopo's photo. In the photographic lineup,
7 Detective Garcia covered up Ifopo's tattoo with black ink, and he also put
8 black ink on the right cheeks of the other individuals in the lineup. Both
9 men identified Ifopo as the man with the gun during the robbery.

10 The police learned that Hernandez was one of Ifopo's
11 acquaintances. In November 2008 Detective Garcia prepared a
12 photographic lineup containing Hernandez's photo and later showed the
13 lineup to Moreno and Rodriguez. Rodriguez identified Hernandez.
14 Moreno indicated to Detective Garcia that he could not recognize the
15 second suspect from a picture, but he would recognize him if he saw him
16 in person. At trial, Moreno identified Hernandez as the man who had
17 stood by the passenger-side door of the car during the robberies.

18 On November 20, 2008, Detective Garcia interviewed Hernandez
19 in the county jail regarding his investigation of the robberies. Detective
20 Garcia showed Hernandez the lineup containing Ifopo's photo and told
21 him Ifopo had been identified as a suspect in a September 2008 robbery
22 case he was investigating. He then showed Hernandez the lineup
23 containing Hernandez's photo and told Hernandez he had been identified
24 as well. Hernandez grabbed the photo lineup and stated he did not rob
25 anyone. Hernandez said he knew Ifopo as "Samoan Alex." He also stated
26 that he and Ifopo had once smoked marijuana at a park near the San Diego
27 Zoo, and on that occasion Ifopo had shown him a black replica handgun
28 that Hernandez believed was a pellet gun. Hernandez told Detective
Garcia, "I don't remember robbing anybody."

ii. The Defense Case

18 Hernandez's cousin, Sylvia Curia, testified that on the night of the
19 robbery Hernandez and his girlfriend, Shannette Kleian, babysat her infant
20 son so she could go to a bar to drink. On cross-examination, Curia stated
21 that Hernandez took her son at around 5:00 p.m., and she assumed he was
22 at his girlfriend's house babysitting Curia's son after that, but she did not
23 know whether her son remained with Hernandez after 5:00 p.m. Curia's
24 mother also testified that Hernandez took Curia's son to his girlfriend's
25 house.

23 Hernandez's girlfriend remembered that she and Hernandez babysat
24 Curia's son at her house in late September 2008. On cross-examination,
25 she stated she was not sure whether she and Hernandez babysat Curia's
26 son on September 27, 2008 (the night of the robberies).

26 Dr. Thomas MacSpeiden, a forensic clinical psychologist, testified
27 about numerous factors that can adversely affect the accuracy of an
28 eyewitness identification of a suspect.

Ifopo testified that he was doing "[a] lot of drinking and getting
high" in Balboa Park on the night of the robberies. He denied that he was

1 with Hernandez that night. Ifopo stated he was with Hernandez in a park
2 near downtown on another occasion when he (Ifopo) had a real gun. Ifopo
3 admitted that on September 27, he walked up to “[t]wo Mexicans” in a car
4 with his hand in his pocket, pretending to have a gun, and told them to
give him “everything.” He stated he once had a nine-millimeter Glock
handgun, but he had sold it. He testified he was “positive” he did not have
a gun on the night of the robberies.

5 (Lodgment No. 7 at 3-6.)

6 **B. Procedural Background**

7 On April 22, 2009, Petitioner was charged in an Amended Information with two
8 counts of robbery under California Penal Code § 211. (Lodgment No. 1 at 6-11.) On
9 August 4, 2009, a jury found Petitioner guilty of both counts. (*Id.* at 374-75.) The jury
10 found true an allegation that although Petitioner was not personally armed with a
11 firearm at the time of the robberies, he was a principal in the commission of the crimes
12 and was vicariously liable within the meaning of California Penal Code § 12022(a)(1).
13 (*Id.*) In a bifurcated proceeding, the trial court found true allegations that Petitioner had
14 (1) served a prior prison term within the meaning of § 667.5(b); (2) suffered two prior
15 serious felony convictions within the meaning of § 667(a)(1); and (3) suffered two prior
16 strike convictions within the meaning of § 667(b)-(i), and § 1170.12(a)-(d). (Lodgment
17 No. 1 at 325; Lodgment No. 2 at 1441-1443.)

18 On December 1, 2009, prior to his sentencing hearing, Petitioner filed a habeas
19 petition in the San Diego Superior Court. (Lodgment No. 11.) The Superior Court
20 denied the petition on January 27, 2010. (Lodgment No. 12.)

21 On March 16, 2010, the trial court sentenced Petitioner under the three strikes
22 law to a prison term of 37 years to life. (Lodgment No. 1 at 325-26.) Petitioner
23 appealed. (Lodgment No. 1 at 327; Lodgment No. 6.) On October 27, 2011, the Court
24 of Appeal affirmed his conviction. (Lodgment No. 7.) Thereafter, Petitioner filed a
25 Petition for Review in the California Supreme Court. (Lodgment No. 9.) The
26 California Supreme Court denied his petition for review in a silent denial on January
27 11, 2012. (Lodgment No. 10.)

28 While his direct appeal was pending, Petitioner filed a habeas petition in the

1 California Court of Appeal. (Lodgment No. 13.) The Court of Appeal denied the
2 petition on November 6, 2011. (Lodgment No. 14.)

3 On March 29, 2012, following the conclusion of his direct appeal, Petitioner filed
4 a habeas petition in the California Supreme Court. (Lodgment No. 16.) On April 13,
5 2012, Petitioner filed a second habeas petition in the California Supreme Court.
6 (Lodgment No. 15.) Both petitions were summarily denied on June 13, 2012.
7 (Lodgment Nos. 17, 18.)

8 On July 2, 2012, Petitioner filed a federal Petition for Writ of Habeas Corpus.
9 (ECF No. 1.) On July 16, 2012, the Court dismissed the Petition without prejudice and
10 with leave to amend because Petitioner failed to satisfy the filing fee requirement or
11 submit adequate proof of his inability to pay the fee, and failed to name a proper
12 respondent. (ECF No. 3.) On July 26, 2012, Petitioner filed his First Amended Petition
13 for Writ of Habeas Corpus. (ECF No. 4.) Petitioner argues (1) he was denied his right
14 to due process when the trial court failed to hold a competency hearing; (2) the trial
15 court erred in admitting his un-*Mirandized* statements; (3) the trial court erred in failing
16 to instruct the jury on competence and intent; and (4) ineffective assistance of counsel.
17 On November 14, 2012, Respondent filed an Answer to the Petition. (ECF No. 19.)
18 On December 17, 2012, Petitioner filed a Traverse. (ECF No. 25.) On February 24,
19 2013, Petitioner filed a supplemental memorandum in support of his Traverse. (ECF
20 No. 27.)

21 **II. DISCUSSION**

22 **A. Legal Standards For Federal Habeas Relief**

23 A federal court “shall entertain an application for a writ of habeas corpus in
24 behalf of a person in custody pursuant to the judgment of a State court only on the
25 ground that he is in custody in violation of the Constitution or laws or treaties of the
26 United States.” 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty
27 Act of 1996 (“AEDPA”) controls review of this Petition. *See Lindh v. Murphy*, 521
28 U.S. 320 (1997). Under AEDPA, a habeas petition will not be granted with respect to

1 any claim adjudicated on the merits by the state court unless that adjudication: (1)
2 resulted in a decision that was contrary to, or involved an unreasonable application of
3 clearly established federal law; or (2) resulted in a decision that was based on an
4 unreasonable determination of the facts in light of the evidence presented at the state
5 court proceeding. 28 U.S.C. § 2254(d)(1) and (2); *Early v. Packer*, 537 U.S. 3, 8
6 (2002). In deciding a state prisoner's habeas petition, a federal court is not called upon
7 to decide whether it agrees with the state court's determination; rather, the court applies
8 an extraordinarily deferential review, inquiring only whether the state court's decision
9 was objectively unreasonable. *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v.*
10 *Horning*, 386 F.3d 872, 877 (9th Cir. 2004).

11 A federal habeas court may grant relief under the "contrary to" clause if the state
12 court applied a rule different from the governing law set forth in Supreme Court cases,
13 or if it decided a case differently than the Supreme Court on a set of materially
14 indistinguishable facts. *Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant
15 relief under the "unreasonable application" clause if the state court correctly identified
16 the governing legal principle from Supreme Court decisions, but unreasonably applied
17 those decisions to the facts of a particular case. *Id.* Additionally, the "unreasonable
18 application" clause requires that the state court decision be more than incorrect or
19 erroneous; to warrant habeas relief, the state court's application of clearly established
20 federal law must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75
21 (2003). In applying 28 U.S.C. § 2254(d)(2), federal habeas courts must defer to
22 reasonable factual determinations made by the state courts, to which a statutory
23 presumption of correctness attaches. 28 U.S.C. § 2254(e)(1); see *Schriro v. Landrigan*,
24 550 U.S. 465, 473-74 (2007).

25 To determine whether habeas relief is available under § 2254(d), the Court "looks
26 through" to the last reasoned state court decision as the basis for its analysis. *Ylst v.*
27 *Nunnemaker*, 501 U.S. 797, 801-04 (1991) ("Where there has been one reasoned state
28 judgment rejecting a federal claim, [federal habeas courts apply the presumption that]

1 later unexplained orders upholding that judgment or rejecting the same claim rest upon
 2 the same ground.”). If the dispositive state court order does not “furnish a basis for its
 3 reasoning,” federal habeas courts must conduct an independent review of the record to
 4 determine whether the state court’s decision is contrary to, or an unreasonable
 5 application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d
 6 976, 982 (9th Cir. 2000), overruled on other grounds by *Andrade*, 538 U.S. at 75-76;
 7 *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

8 “A spare order denying a petition without explanation or citation ordinarily ranks
 9 as a disposition on the merits.” *Walker v. Martin*, 131 S.Ct. 1120, 1124 (2011); *see also*
 10 *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). “When a federal claim has been
 11 presented to a state court and the state court has denied relief, it may be presumed that
 12 the state court adjudicated the claim on the merits in the absence of any indication or
 13 state-law procedural principles to the contrary.” *Harrington*, 131 S.Ct. at 784-85 (*citing*
 14 *Harris v. Reed*, 489 U.S. 255, 265 (1989) (presumption of a merits determination when
 15 it is unclear whether a decision appearing to rest on federal grounds was decided on
 16 another basis)); *see also Hunter v. Aispuro*, 982 F.2d 344, 347-348 (9th Cir. 1992)
 17 (California Supreme Court’s denial of a habeas petition without comment or citation
 18 constitutes a decision on the merits). Even “[w]here a state court’s decision is
 19 unaccompanied by an explanation, the habeas petitioner’s burden still must be met by
 20 showing there was no reasonable basis for the state court to deny relief.” *Id.*

21 **B. Evidentiary Hearing**

22 Petitioner did not initially request an evidentiary hearing in the Petition.
 23 However, in his Traverse, Petitioner states he is entitled to an evidentiary hearing.
 24 (ECF Nos. 25 at 6; 27 at 6-7.) The Court finds that Petitioner has not shown that further
 25 factual development is necessary, such that an evidentiary hearing would be warranted.
 26 *See* 28 U.S.C. § 2254(e)(2) (listing exceptions when an evidentiary hearing may be
 27 appropriate). Because the claims in the petition can be resolved by reference to the
 28 record, the Court finds an evidentiary hearing is not necessary. *Schriro v. Landrigan*,

1 550 U.S. 465, 474 (2007).

2 **C. Ground One: Trial Court Failed to Hold a Competency Hearing**

3 In ground one, Petitioner alleges he was denied his right to due process when the
4 trial court failed to hold a hearing pursuant to California Penal Code § 1368 to
5 determine his mental competency. (ECF No. 4 at 6.) Petitioner claims the trial court
6 was provided with information, including medical reports and a sentencing motion, that
7 addressed his mental status. (*Id.*) Petitioner claims the information showed he had a
8 history of mental illness and fell within the range of mental retardation, which required
9 the trial court to hold a hearing under § 1368.² (*Id.*) Respondent argues this claim
10 should be denied because there was no evidence Petitioner was incompetent to stand
11 trial and the state court reasonably rejected this claim. (ECF No. 19 at 11-13.) For the
12 reasons set forth below, the Court agrees with Respondent.

13 Petitioner presented this claim to the California Supreme Court in his habeas
14 petitions. (Lodgment Nos. 15, 16.) The California Supreme Court summarily denied
15 his petitions without citation of authority or analysis. (Lodgment Nos. 17, 18.)
16 Petitioner did not raise this claim in the Superior Court or the Court of Appeal.
17 Therefore, there is no reasoned state court decision to which this Court can look through
18 to. Accordingly, the Court must conduct an independent review of the record to
19 determine whether the state court's denial of this claim was contrary to, or an
20 unreasonable application of, clearly established federal law. *See Delgado*, 223 F.3d at
21 982.

22 Due process is violated by the conviction of a person who is legally incompetent
23 to stand trial. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). "The failure to observe

24 ² California Penal Code § 1368 provides in relevant part:

25 If, during the pendency of an action and prior to judgment, a doubt
26 arises in the mind of the judge as to the mental competence of the
27 defendant, he or she shall state that doubt in the record and inquire of
28 the attorney for the defendant whether, in the opinion of the attorney,
the defendant is mentally competent . . . If counsel informs the court
that he or she believes the defendant is or may be mentally
incompetent, the court shall order that the question of the defendant's
mental competence is to be determined in a hearing.

1 procedures adequate to protect a defendant's right not to be tried or convicted while
2 incompetent to stand trial deprives him of his due process right to a fair trial." *Drope*
3 *v. Missouri*, 420 U.S. 162, 172 (1975). The standard for determining competence to
4 stand trial is whether the defendant has "sufficient present ability to consult with his
5 lawyer with a reasonable degree of rational understanding—and whether he has a rational
6 as well as factual understanding of the proceedings against him." *Pate v. Robinson*, 383
7 U.S. 375, 388 (1966); *Dusky v. United States*, 362 U.S. 402 (1960); *Torres v. Prunty*,
8 223 F.3d 1103, 1106-07 (9th Cir. 2000). "[W]here the evidence raises a 'bona fide
9 doubt' as to a defendant's competence to stand trial, the trial judge on his own motion
10 . . . must conduct a hearing to determine competency to stand trial." *Torres*, 223 F.3d
11 at 1106-07 (citing *Drope*, 420 U.S. at 172-73; *Pate*, 383 U.S. at 385.). Factors courts
12 consider in ascertaining whether a competency hearing is required include evidence of
13 the defendant's irrational behavior, his demeanor at trial, and any prior medical opinion
14 on competence. *Drope*, 420 U.S. at 180; *United States v. Lewis*, 991 F.2d 524, 527 (9th
15 Cir. 1993). When determining whether a defendant's due process rights were violated,
16 "[t]he question to be asked by the reviewing court is whether a reasonable judge,
17 situated as was the trial court judge whose failure to conduct an evidentiary hearing is
18 being reviewed, should have experienced doubt with respect to competency to stand
19 trial." *Mendez v. Knowles*, 556 F.3d 757, 771 (9th Cir. 2009).

20 Here, Petitioner did not raise the issue of his competence prior to, or during trial.
21 In fact, a competency hearing was not specifically requested at any time. However,
22 Petitioner's mental status was addressed during sentencing. Petitioner's counsel filed
23 a Romero motion requesting the court strike one of his prior strike convictions under
24 the three strikes law. (Lodgment No. 1 at 282-288.) In support of that request, the
25 motion provided information about Petitioner's background, including that Petitioner
26 had a history of mental illness, drug addiction, and had been tested and found to be in
27 the low to borderline range of intellectual ability. (*Id.* at 285-288.) The motion did not,
28 however, argue that Petitioner was incompetent.

1 Further, reviewing the record, the Court finds there is no evidence that Petitioner
2 exhibited irrational behavior, or that his demeanor at trial or other court appearances
3 suggested he was incompetent. For example, Petitioner testified at the hearing on his
4 motion to suppress statements. (Lodgment No. 2 at 229-46.) Petitioner was examined
5 on direct and cross examination. (*Id.*) The transcript from the hearing does not show
6 that Petitioner was confused or incapacitated at any point. (*Id.*) Rather, it appears
7 Petitioner understood the proceeding and testified in a meaningful way.

8 Petitioner also did not provide a prior medical opinion on his competence. The
9 Court notes that Petitioner was evaluated by Dr. Meredith Friedman, Ph.D., a licensed
10 clinical psychologist, prior to his sentencing hearing. (Lodgment No.1 at 260-74.)
11 However, it does not appear Dr. Friedman believed Petitioner was incompetent. Dr.
12 Friedman indicated Petitioner was addicted to drugs and his intellectual functioning was
13 in the borderline mentally retarded range. (*Id.* at 287-88.) However, she also found
14 Petitioner had a sincere recognition of the gravity of his behavior. (*Id.* at 288.)
15 Notably, Dr. Friedman did not opine that Petitioner was unable to consult with counsel
16 or comprehend the proceedings.

17 Finally, nothing suggests Petitioner was unable to consult with counsel or
18 understand the proceedings. The prosecutor noted he had dealt with Petitioner for over
19 a year and Petitioner had always been respectful to the Court in every hearing.
20 (Lodgment No. 2 at 1448.) Also, Petitioner was able to draft and file documents
21 including a habeas petition prior to his sentencing hearing (Lodgment No. 11.), a pro
22 se motion for new counsel (Lodgment No. 5), and a pro se motion for co-counsel.
23 (Lodgment No. 8.).

24 Having reviewed the record, including the transcripts from the pretrial motion
25 hearing, the trial, and sentencing hearing, the Court finds nothing suggests that the trial
26 court should have doubted Petitioner's competency. Thus, the trial court had no duty
27 to order a competency hearing. Therefore, the California Supreme Court's rejection of
28 this claim was not contrary to, or an unreasonable application of, clearly established

1 federal law. Accordingly, the Court recommends that Petitioner's claim in ground one
2 be **DENIED**.

3 **D. Ground Two: Trial Court Erred in Failing to Suppress Un-**
4 **Mirandized Statements**

5 In ground two, Petitioner alleges that his Fifth Amendment rights were violated
6 when he was interviewed without *Miranda* warnings pursuant to *Miranda v. Arizona*,
7 384 U.S. 436 (1966). (ECF No. 4 at 7.) Petitioner claims he was in custody for
8 purposes of *Miranda* when he was interviewed by Detective Garcia at the San Diego
9 County jail. (*Id.*) Petitioner argues that because Detective Garcia did not read him his
10 *Miranda* rights, his statements should have been suppressed. (*Id.*) Respondent counters
11 that this claim should be denied because the state courts reasonably rejected this claim.
12 (ECF No. 19 at 13-17.) For the reasons set forth below, the Court agrees with
13 Respondent.

14 Petitioner presented this claim to the California Supreme Court on direct appeal.
15 (Lodgment No. 9.) The court denied his claim without comment. (Lodgment No. 10.)
16 Accordingly, the Court will look through the silent denial to the Court of Appeal's
17 October 27, 2011 opinion. *Ylst*, 501 U.S. at 804. The Court of Appeal rejected
18 Petitioner's claim, applying federal and state case law. (Lodgment No. 7.) The Court
19 of Appeal analyzed the facts under the four-factor test set forth in *Cervantes v. Walker*,
20 589 F.2d 424, 427-28 (9th Cir. 1978), and concluded that under the totality of the
21 circumstances, Petitioner was not in custody for *Miranda* purposes. (*Id.* at 20-24.)
22 Therefore, the Court of Appeal held the trial court did not err in denying Petitioner's
23 motion to suppress. (*Id.* at 25.) Specifically, the Court stated:

24 Here, since Hernandez was not free to leave the detention facility
25 entirely, we analyze the facts in light of the four *Cervantes* factors this
26 court adopted in *Macklem* to determine whether some additional degree of
restraint was imposed upon him that forced him to participate in the
interview. (See *Macklem*, *supra*, 149 Cal.App.4th at pp.695-696.)

27 Regarding the first *Cervantes* factor, the language used to summon
28 the inmate for questioning, the record shows Hernandez was summoned
to the visiting room through the loudspeaker when someone announced,

1 “Hernandez, you have a professional visit.” When Hernandez entered the
2 room, Detective Garcia, who was dressed in civilian clothes, identified
3 himself, showed Hernandez his badge, and told Hernandez he was
4 investigating a robbery that occurred in Balboa Park in September 2008.
5 Detective Garcia made no threats and said nothing to suggest he absolutely
6 had to speak with Hernandez during the interview. We conclude there is
7 no evidence the language summoning Hernandez to the visiting room was
8 coercive.

9
10 Regarding the second *Cervantes* factor, the physical surroundings
11 of the questioning, Detective Garcia described the visiting room as an area
12 where family, defense attorneys, and law enforcement commonly meet
13 with inmates. He testified the room contained three booths where visitors
14 speak with inmates, and in each booth bars separate the inmate’s area from
15 the visitor’s area. Detective Garcia explained that although the doors
16 behind Hernandez and him were locked, Hernandez could knock on his
17 door to summon a guard and tell him he was done.

18
19 Hernandez gave similar testimony, indicating he and the visitor
20 would be on opposite side of the bars, and although the door would be
21 locked behind him, there was a buzzer he could push to let the deputies
22 know he was done if he did not want to talk to the visitor. Acknowledging
23 he was in custody at the jail for a parole violation, Hernandez indicated he
24 previously had been interviewed in the visiting room by attorneys,
25 investigators and police officers while in custody. The record shows he
26 was not handcuffed when he entered the room, and he remained uncuffed
27 during the interview. When asked during the hearing on his suppression
28 motion whether he went to the visiting room “freely,” Hernandez stated,
“Yes.”

16 These facts relating to the physical surroundings where the
17 interview took place weigh against any finding of coerciveness because
18 Hernandez acknowledged he freely participated in the interview and knew
19 he would be taken out of the visiting room at his request. In this regard,
20 we note that “an interview room where attorneys and [family] visit . . .
21 inmates is as close to neutral territory as is available in the detention
22 facility.” (*Macklem, supra*, 149 Cal.App.4th at p.696.)

23 With respect to the third *Cervantes* factor, the extent to which the
24 inmate was confronted with evidence of his guilt, the record shows that in
25 the course of explaining why he was interviewing Hernandez, Detective
26 Garcia confronted him with some evidence of his guilt. Specifically, after
27 Detective Garcia identified himself and told Hernandez he was
28 investigating an armed robbery in Balboa Park, he showed Hernandez a
photo lineup containing a photo of Ifopo and informed Hernandez that
Ifopo had been identified as a suspect. Detective Garcia then showed
Hernandez a photo lineup containing Hernandez’s photo, told him the
victim had identified him, and explained that he was there to hear
Hernandez’s side of the story. Before Detective Garcia attempted to
advise Hernandez of his *Miranda* rights, Hernandez grabbed the lineup
containing his photo, looked at it, and made statements that Detective
Garcia described as “sudden” and “spontaneous.” Hernandez stated he
“didn’t rob anybody,” and he knew Ifopo as “Samoan Alex,” and he
remembered one time when the two of them were at a park near the zoo
smoking marijuana and Ifopo showed him what Hernandez believed was

1 a black pellet gun. In his testimony, Detective Garcia stated he did not
 2 interrupt Hernandez and, when Hernandez was done, he attempted to
 3 advise Hernandez of his *Miranda* rights, as Hernandez acknowledged
 4 during his testimony. Hernandez, however, immediately ended the
 5 interview, telling Detective Garcia, "You ain't going to read me no rights.
 I ain't even going to talk about this no more." Detective Garcia testified
 that Hernandez knocked on the door and a deputy arrived 30 to 60 seconds
 later to retrieve him. According to Detective Garcia, Hernandez "didn't
 give [him] a chance to *Mirandize* him."

6 With respect to the fourth *Cervantes* factor, whether any additional
 7 pressure was exerted to detain the inmate, the forgoing circumstances do
 8 not disclose that any additional pressure was exerted to detain Hernandez
 and coerce him into participating in the interview. Hernandez was given
 the opportunity to leave the visiting room at any time during the interview.

9 We conclude under the totality of the circumstances that Hernandez
 10 was not in custody for *Miranda* purposes during his jailhouse interview,
 11 the protections of *Miranda* thus did not apply, and the fact he made
 12 spontaneous statements before Detective Garcia attempted to give a
Miranda warning did not make those statements inadmissible.

13 . . .

14 For all the foregoing reasons, we conclude the court did not err in
 denying Hernandez's suppression motion.

15 (Lodgment No. 7 at 20-25.)

16 Clearly established Supreme Court law provides that *Miranda* warnings are
 17 required for a person questioned by police after being "taken into custody or otherwise
 18 deprived of his freedom in any significant way." *Miranda*, 384 U.S. at 444. The
 19 ultimate inquiry into whether custody has attached "is simply whether there [was] a
 20 formal arrest or restraint on freedom of movement of the degree associated with a
 21 formal arrest.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *California*
 22 *v. Beheler*, 463 U.S. 1121, 1125 (1983).) The fact that a person is detained a jail facility
 23 does not necessarily make questioning of that person a custodial interrogation for
 24 purposes of *Miranda*. *Beheler*, 462 U.S. at 1125; *Howes v. Fields*, 132 S.Ct. 1181,
 25 1187 (2012); *Cervantes v. Walker*, 589 F.2d 424, 427-28 (9th Cir. 1978). Instead the
 26 totality of the circumstances of each case must be examined. *Howes*, 132 S.Ct. at 1189;
 27 *Yarborough v. Alvarado*, 541 U.S. 652, 661-62 (2004). Because the Supreme Court's
 28 test for determining custody is a general standard, the range of reasonable judgment by

1 a state court on this issue is broad. *Yarborough*, 541 U.S. at 663-64.

2 In *Thompson v. Keohane*, 516 U.S. 99, 112 (1995), the Supreme Court explained
3 that the custody determination for *Miranda* purposes requires two inquiries. First, the
4 state court must determine what the circumstances surrounding the interrogation were.
5 *Id.* at 112. That is a factual inquiry, entitled to a presumption of correctness under 28
6 U.S.C. § 2254(d). *Id.* Second, given those circumstances, the court must determine
7 whether a reasonable person would have felt he or she was not at liberty to terminate
8 the interrogation and leave. *Id.* at 112-13. This second inquiry calls for an application
9 of the controlling legal standard to the historical facts and presents a mixed question of
10 law and fact qualifying for independent review by the habeas court. *Id.* at 102 (stating
11 “state court determinations as to whether suspect was ‘in custody’ at time of
12 interrogation for purposes of *Miranda* is not entitled statutory presumption of
13 correctness during federal habeas corpus review”). In a prison context, the following
14 factors are relevant to determine whether a reasonable person would believe that there
15 had been a restriction of his freedom over and above that in his normal prisoner setting:

16 [1] the language used to summon the individual, [2] the physical
17 surroundings of the interrogation, [3] the extent to which he is confronted
18 with evidence of his guilt, and [4] the additional pressure exerted to detain
him.

19 *Cervantes*, 589 F.2d at 428. See also *Howes*, 132 S. Ct. at 1192 (“When a prisoner is
20 questioned, the determination of custody should focus on all the features of the
21 interrogation. These include the language that is used in summoning the prisoner to the
22 interview and the manner in which the interrogation is conducted.”).

23 Although Petitioner alleges he should have been given *Miranda* warnings, he
24 does not challenge the state court’s factual findings of the circumstances surrounding
25 the interrogation. Accordingly, this Court presumes those findings are correct pursuant
26 to 28 U.S.C. § 2254(e)(1). Next, considering the factors set forth in *Cervantes*, the
27 Court concludes that the California Court of Appeal’s determination that Petitioner was
28 not in custody, was not an unreasonable application of clearly established law.

1 Petitioner was in custody at the county jail for a parole violation when he was
2 interviewed by Detective Garcia on November 20, 2008. (Lodgment No. 7 at 5, 7.) As
3 to the first factor, Petitioner was notified by a loud speaker, “Hernandez, you have a
4 professional visit.” (Lodgment No. 7 at 10.) Petitioner went freely to the visitor room.
5 (*Id.* at 11.) Detective Garcia was dressed in civilian clothes, identified himself, and
6 indicated that he was investigating a robbery that had occurred in Balboa Park. (*Id.* at
7 20.)

8 As to the second factor, the interview took place in a visitor room, where inmates
9 can meet with family, attorneys, investigators, and police officers. (Lodgment No. 7 at
10 10.) The room contains three booths, and the inmate’s area is separated from the
11 visitor’s area by bars. (*Id.* at 20.) The visitor room is locked. (*Id.* at 10.) However, if
12 an inmate does not want to talk to the visitor, he can push a buzzer to let the guard know
13 he is done. (*Id.*) Petitioner was familiar with the visitor room, and had previously been
14 interviewed there while he was in custody. (*Id.* at 10.)

15 As to the third factor, after Detective Garcia introduced himself to Petitioner, he
16 did confront Petitioner with some evidence of his guilt. Detective Garcia showed
17 Petitioner the photo lineup that contained Ifopo’s picture. (*Id.* at 8.) Then he showed
18 Petitioner the photo lineup that contained Petitioner’s photo. (*Id.*) Detective Garcia
19 told Petitioner he had been identified by the victim, and said he was there to get
20 Petitioner’s side of the story. (*Id.* at 9.) Petitioner testified at the suppression hearing
21 that he viewed Detective Garcia’s statement as an accusation. (*Id.* at 10.) After
22 Petitioner looked at the lineup he stated “I didn’t rob anyone.” (*Id.*) He also indicated
23 he knew Ifopo as “Samoan Alex”, and remembered smoking marijuana at Balboa Park
24 with him once and Ifopo showed him a black pellet gun. (*Id.*) Detective Garcia
25 attempted to *Mirandize* Petitioner, but Petitioner stood up and said he did not want to
26 talk to the Detective anymore. (*Id.* at 8-9.)

27 Regarding the fourth factor, Petitioner was not restrained or handcuffed. (*Id.* at
28 21.) The interview lasted approximately 8 to 12 minutes. (*Id.* at 9.) Petitioner knew

1 he could summon the guard at any time if he wanted to leave. (*Id.* at 11.) When
2 Petitioner decided he didn't want to talk to Detective Garcia anymore, he got up and
3 knocked on his door. (*Id.* at 9.) Approximately 30 to 60 seconds later, a deputy came
4 and removed Petitioner from the room. (*Id.*)

5 Although there are some facts that suggest Petitioner was in custody during the
6 interview, the state court weighed the factors and determined that under the totality of
7 the circumstances, Petitioner was not in custody for purposes of *Miranda*. The Court
8 finds the state court's weighing of the factors and application of clearly established
9 federal law was reasonable. *See Yarborough*, 541 U.S. at 664-65 (recognizing that the
10 custody test is a general one, which gives state courts more leeway in reaching case-by-
11 case results); *Stanley v. Schriro*, 593 F.3d 612, 618-19 (9th Cir. 2010) (citing
12 *Yarborough* and denying habeas relief because "the state court delineated and weighted
13 factors comparable to those the Supreme Court has considered"); *see, e.g. Beheler*, 463
14 U.S. at 1125 (concluding that the defendant was not "in custody" even though the police
15 suspected him of the crime and the interview took place at the police station);
16 *Mathiason*, 429 U.S. at 495 (finding no indication that the questioning took place in a
17 context where the suspect's freedom to leave was restricted in any way even though the
18 police interviewed the suspect at the police station and indicated they suspected he was
19 involved in the burglary).

20 After considering the totality of the circumstances, the Court finds the Court of
21 Appeal's determination that Petitioner was not in custody for purposes of *Miranda* was
22 not contrary to, or an unreasonable application of, clearly established federal law under
23 28 U.S.C. § 2254(d). Accordingly, the Court recommends that Petitioner's claim in
24 ground two be **DENIED**.

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1 **E. Ground Three: Trial Court Failed to Instruct the Jury on**
 2 **Competence and Intent**

3 In ground three, Petitioner alleges his due process rights were violated when the
 4 trial court failed to instruct the jury on competence and intent. (ECF No. 4 at 8.)
 5 Respondent argues the trial court properly declined to instruct the jury on competence
 6 and that the jury was, in fact, instructed on intent. (ECF No. 19 at 12.) The Court
 7 agrees with Respondent.

8 Petitioner contends he was denied a fair trial and his right to due process because
 9 the trial court failed to instruct the jury on competence. (ECF No. 4 at 4.) Petitioner
 10 did not raise this claim in the lower courts, but did present it in his Petition for Writ of
 11 Habeas Corpus to the California Supreme Court, which the Court summarily denied.
 12 (Lodgment Nos. 16 and 17.) Because there is no reasoned state court decision to which
 13 this Court can look through to, the Court must independently review the record to
 14 determine if the California Supreme Court's rejection of this claim was objectively
 15 reasonable. *See Delgado*, 222 F.3d at 982.

16 A petitioner can obtain federal habeas relief on a jury instruction claim if he can
 17 demonstrate that the instructional error "by itself so infected the entire trial that the
 18 resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)
 19 (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1983)). If a federal habeas court
 20 determines that the trial court erred in instructing the jury, it must also determine
 21 whether the error prejudiced the defendant. *See Henderson v. Kibbe*, 431 U.S. 145,
 22 153-54 (1977). A challenged instruction must not be viewed in isolation; instead, it
 23 must be considered "in the context of the instructions as a whole and the trial record."
 24 *Estelle*, 502 U.S. at 72 (citing *Cupp*, 414 U.S. at 147).

25 A petitioner challenging a trial court's failure to give a jury instruction has a
 26 much heavier burden than one challenging an erroneous instruction that was given.
 27 *Henderson*, 431 U.S. at 155. "An omission or an incomplete instruction, is less likely
 28 to be prejudicial than a misstatement of the law." *Id.* To determine whether a defendant

1 was prejudiced by the omission of a jury instruction, the Court must look at the
2 adequacy of the instructions that were actually given. *Id.* at 154, 156.

3 As the Court previously explained, the record does not show that Petitioner's
4 competency was at issue during the trial. Indeed, Petitioner did not raise incompetency
5 as a defense. (Lodgment No. 2 at 1352-79). Therefore, there was no reason for the trial
6 court to instruct the jury on competency. Because Petitioner's competence was not at
7 issue, the Court finds the failure to give a competency instruction did not render the trial
8 so fundamentally unfair as to violate federal due process. *Cupp v. Naughten*, 414 U.S.
9 147 (1973).

10 Petitioner also contends he was denied a fair trial and his right to due process as
11 a result of the trial court's failure to instruct the jury on intent.³ This claim is refuted by
12 the record. The jury was instructed on intent. Specifically, the following written
13 instruction was given:

14 The defendants are charged in Counts One and Two with robbery.
15 To prove that the defendant is guilty of this crime, the People must prove
16 that: . . . 5. When the defendant used force or fear to take the property, he
17 intended to deprive the owner of it permanently or to remove it from the
owner's possession for so extended a period of time that the owner would
be deprived of a major portion of the value or enjoyment of the property.

18 The defendant's intent to take the property must have been formed
19 before or during the time he used force or fear. If the defendant did not
20 form this required intent until after using the force or fear, then he did not
commit robbery.

21 ³ The Court notes that on direct appeal, Petitioner argued the trial court failed to instruct the
22 jury on the element of knowledge for the firearm enhancement. (Lodgment No. 3.) It does not appear
23 that Petitioner is raising that argument here. However, to the extent he is, the Court finds that he is
24 not entitled to relief. The Court of Appeal rejected Petitioner's argument on the ground that under
25 California law, the firearm enhancement does not have a scienter requirement. *See People v. Overton*
26 (1994) 28 Cal.App.4th 1497, 1500 ("there is no scienter requirement for an aider or abettor to be found
27 vicariously armed with a firearm under section 12022[(a)(1)]"). Therefore, the Court of Appeal found
28 the trial court had no duty to instruct the jury on knowledge regarding the firearm enhancement.
(Lodgment No. 7 at 27.) The state court's determination of state law issues cannot be reviewed by
a federal habeas court. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a
federal habeas court to reexamine state-court determinations on state-law questions."). Therefore, to
the extent Petitioner's claim rests on the Court of Appeal's decision regarding the intent instruction
for the firearm enhancement, he has not presented a cognizable federal claim. Moreover, Petitioner
has not demonstrated that the Court of Appeal's decision is contrary to, or an unreasonable application
of, clearly established federal law.

(Lodgment No 1. at 125.)

In addition, the trial Judge verbally instructed the jury as follows:

The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent. The instruction for each crime and allegation explains the intent required, and intent may be proved by circumstantial evidence.

...

The following allegations require general criminal intent: . . . vicarious arming as charged in Counts 1 and 2 against defendant Hernandez.

For you to find the allegations true, the person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act on purpose. However, it is not required that he intends to break the law. The act required is explained in the instructions for that crime or allegation.

The following crimes require specific intent: robbery as charged in Counts 1 and 2. . . Aiding and abetting also requires specific intent. For you to find a person guilty of these crimes, that person must not only intentionally commit the prohibited act but must do so with the specific intent. The act and specific intent required are explained in the instruction for that crime.

(Lodgment No. 2 at 1313, 1315-16.)

The trial court also provided jury instructions on Circumstantial Evidence: Intent; Union of Act and Intent: General and Specific Intent Together; and Aiding and Abetting: Intended Crimes. (*See* Lodgment No. 1 at 100, 103, 124.)

Because there was no evidence that Petitioner's competency was at issue during the trial, and because the trial court in fact instructed the jury on intent, the Court finds the California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, the Court recommends that Petitioner's claim in ground three be **DENIED**.

F. Ground Four: Ineffective Assistance of Counsel

In ground four, Petitioner claims his trial counsel was ineffective. (ECF No. 4 at 9.) He alleges five instances of deficient performance: (1) counsel allowed a prejudicial lineup to be introduced into evidence; (2) counsel allowed the *Miranda* issue to stand; (3) counsel allowed statements of guilt into evidence; (4) counsel failed to file

1 a motion regarding Petitioner's competency; and (5) counsel failed to act as an advocate
2 during sentencing. (*Id.* at 9.) Respondent counters that the state court properly rejected
3 Petitioner's claim because he failed to establish either prong of the *Strickland* test for
4 ineffective assistance of counsel. (ECF No. 19 at 18-21.) For the reasons set forth
5 below, the Court agrees with Respondent.

6 Petitioner presented his ineffective assistance of appellate counsel claim to the
7 California Supreme Court in his Habeas Petition, and it was denied without comment.
8 (Lodgment Nos. 15 and 18.) Because Petitioner did not raise this claim in the lower
9 courts, there is no reasoned state court decision to which this Court can look through
10 to. Therefore, the Court must independently review the record to determine if the
11 California Supreme Court's rejection of this claim was objectively reasonable. *See*
12 *Delgado*, 223 F.3d at 982.

13 The clearly established United States Supreme Court precedent governing
14 ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668
15 (1984). *See Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996) (stating that
16 *Strickland* "has long been clearly established federal law determined by the Supreme
17 Court of the United States"). Under *Strickland*, Petitioner must show both incom-
18 petence of counsel and prejudice in order to justify issuance of the writ. *Strickland*, 466
19 U.S. at 688. However, the court need not address both prongs if the petitioner fails to
20 make a sufficient showing of either one. *Id.* at 697.

21 A petitioner can establish incompetency by showing counsel's performance fell
22 below an objective standard of reasonableness. *Id.* at 688. However, judicial scrutiny
23 of counsel's performance should be highly deferential. *Id.* at 689. There is a "strong
24 presumption that counsel's conduct falls within a wide range of reasonable professional
25 assistance." *Id.* at 686-87. A petitioner can establish prejudice by showing that "there
26 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
27 proceeding would have been different. A reasonable probability is a probability
28 sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *See*

1 *also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

2 “Federal habeas courts must guard against the danger of equating
3 unreasonableness under *Strickland* with unreasonableness under § 2254(d).”
4 *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011) (reversing a Ninth Circuit en banc
5 grant of habeas relief on an ineffective assistance claim for lack of sufficient deference
6 to the state court result). “[T]he question is not whether counsel’s actions were
7 reasonable,” but rather “whether there is any reasonable argument that counsel satisfied
8 *Strickland*’s deferential standard.” *Id.* See also *Cullen v. Pinholster*, 131 S.Ct. 1388,
9 1403 (2011) (“We take a ‘highly deferential’ look at counsel’s performance . . . through
10 the ‘deferential lens of § 2254(d).’”) (citation omitted). The petitioner “must show that
11 the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable
12 manner.” *Bell v. Cone*, 535 U.S. 685, 699 (2002).

13 **1. Ineffective Assistance of Counsel for Allowing Lineup to be**
14 **Introduced Into Evidence**

15 First, Petitioner claims that his trial counsel provided ineffective assistance by
16 failing to suppress a suggestive and prejudicial photographic lineup. (ECF No. 4 at 9.)
17 This argument fails because defense counsel did, in fact, move to suppress the lineup.

18 On July 20, 2009, Petitioner’s counsel filed a Motion in Limine to Suppress
19 Identification Evidence, urging the court to suppress both the out-of-court identification
20 of Petitioner as the perpetrator of the crime, as well as any subsequent in-court
21 identifications of Petitioner as the perpetrator of the crime. (Lodgment No. 1 at 49-55.)
22 The motion contended the witness’s identification of Petitioner at a pretrial
23 confrontation was unnecessarily suggestive and conducive to irreparable mistaken
24 identification. (*Id.*) Petitioner’s counsel also argued the motion before the trial court.
25 (Lodgment No. 2 at 253-65.) The trial court denied the motion. (*Id.* at 265.)

26 The fact that an attorney loses an argument is not an indicator of overall poor
27 performance. In our adversarial legal system, which by definition results in a winner
28 and a loser, a loss does not necessarily equate with incompetence of counsel. Here,

1 Petitioner's counsel presented the trial court with a well-reasoned motion, and zealously
2 argued the motion before the Court. The fact that the motion was ultimately denied
3 does not mean counsel provided ineffective assistance. Petitioner, therefore, fails to
4 show that his attorney's conduct fell below an objective standard of reasonableness.
5 Further, because counsel did raise the argument and it was rejected, Petitioner cannot
6 satisfy the prejudice prong, which requires Petitioner to show there is a reasonable
7 probability that the result of the proceedings would have been different. *Strickland*, 466
8 U.S. at 694

9 Based on an independent review of the record, the Court finds the California
10 Supreme Court's denial of this claim was not contrary to, or an unreasonable
11 application of, clearly established Federal law. Accordingly, the Court recommends
12 that Petitioner's claim in ground four based on the photographic lineup be **DENIED**.

13 **2. Ineffective Assistance of Counsel For Allowing *Miranda* Issue**
14 **to Stand**

15 Second, Petitioner alleges his trial counsel was ineffective because he allowed
16 the *Miranda* issue to stand. (ECF No. 4 at 9.) Petitioner's claim is not supported by the
17 record. On July 20, 2009, Petitioner's counsel filed a Motion in Limine to Suppress
18 Defendant's Custodial Statements, requesting the court prohibit the prosecution from
19 mentioning any of the statements Petitioner made to Detective Garcia while he was in
20 custody. (Lodgment No. 1 at 56-62.) At the suppression hearing, Petitioner's counsel
21 vigorously cross-examined the prosecution's witness, Detective Garcia, and called
22 Petitioner to testify. (Lodgment No. 2 at 215-246.) Counsel also argued the motion
23 before the court. (*Id.* at 247-48.) The court denied the motion in part, and granted it in
24 part. (*Id.* at 251-52.) Specifically, the court held Petitioner's statements to Detective
25 Garcia were admissible up until the detective asked Petitioner where he was on the date
26 in question. The court found that from that point on, any statements Petitioner made
27 should be suppressed. (*Id.* at 252.)

28 It appears Petitioner's counsel did all that he could reasonably be expected to do

1 to try and suppress Petitioner's statements. As explained above, competence does not
 2 require an attorney to win every argument. Therefore, Petitioner has not shown that his
 3 attorney's conduct fell below an objective standard of reasonableness simply because
 4 he did not prevail on the motion to suppress statements. Nor can Petitioner show that
 5 he was prejudiced under *Strickland*.

6 Based on an independent review of the record, the Court finds the California
 7 Supreme Court's denial of this claim was not contrary to, or an unreasonable
 8 application of, clearly established federal law. Accordingly, the Court recommends that
 9 Petitioner's claim in ground four regarding the *Miranda* statements be **DENIED**.

10 3. Ineffective Assistance of Counsel For Failure to Suppress 11 Petitioner's Statements of Guilt

12 Third, Petitioner alleges his trial counsel was ineffective for allowing Petitioner's
 13 statements of guilt into evidence. (ECF No. 4 at 9.) This claim is the same as
 14 Petitioner's claim of ineffective assistance based on allowing the *Miranda* issue to
 15 stand. As already explained, Petitioner's counsel attempted to prevent the admission
 16 of Petitioner's statements by filing and arguing a motion to suppress statements.
 17 (Lodgment No. 1 at 56-62; Lodgment No. 2 at 215-248.) The fact that the court denied
 18 the motion does not amount to incompetence on the part of defense counsel. Petitioner
 19 has not shown that his counsel's performance was otherwise deficient or that he was
 20 prejudiced under *Strickland*.

21 Based on an independent review of the record, the Court finds the California
 22 Supreme Court's denial of this claim was not contrary to or an unreasonable application
 23 of clearly established federal law. Accordingly, the Court recommends that Petitioner's
 24 claim in ground four regarding Petitioner's statements of guilt be **DENIED**.

25 4. Ineffective Assistance of Counsel for Failing to File a Motion 26 Regarding Petitioner's Competency

27 Fourth, Petitioner alleges his trial counsel was ineffective for filing a Romero
 28 motion prior to his sentencing, which contained information regarding Petitioner's

1 mental capacity. (ECF No. 4 at 9.) It appears Petitioner is arguing counsel should have
 2 filed a motion regarding Petitioner's competency earlier in the proceedings. As
 3 previously addressed regarding Petitioner's claim that the trial court failed to hold a
 4 competency hearing, there was no evidence that Petitioner was incompetent during the
 5 proceedings. Because there was no evidence to create a doubt about Petitioner's
 6 competency, counsel was not ineffective for failing to file an earlier motion regarding
 7 Petitioner's competency. *United States v. Shah*, 878 F.2d 1156, 1162 (9th Cir. 1989)
 8 (counsel is not ineffective for failing to raise a meritless legal argument).

9 Based on an independent review of the record, the Court finds the California
 10 Supreme Court's denial of this claim was not contrary to, or an unreasonable
 11 application of, clearly established federal law. Accordingly, the Court recommends
 12 that Petitioner's claim in ground four regarding Petitioner's competency be **DENIED**.

13 5. Ineffective Assistance of Counsel For Failing to Act as an 14 Advocate During Sentencing

15 Finally, Petitioner alleges ineffective assistance on the ground that his counsel
 16 failed to act as an advocate during sentencing. (ECF No. 4 at 9.) Again, Petitioner's
 17 claim is belied by the record. Trial counsel sought and obtained a mental evaluation by
 18 Dr. Friedman prior to sentencing, filed a Romero motion urging the court to strike one
 19 of Petitioner's prior strike convictions, presented the court with three personal reference
 20 letters, and argued for a lesser sentence based on Petitioner's mental condition and drug
 21 addiction. (Lodgment No. 1 at 260-74, 282-88, 289-92, Lodgment No. 2 at 1445-46.)
 22 Petitioner complains that the Romero motion was mistitled and that his counsel did not
 23 make sure the court read the motion. (ECF No. 27 at 6.) However, a review of the
 24 motion shows that it was properly titled, as counsel was specifically requesting relief
 25 from the court pursuant to *People v. Superior Court (Romero)*, 13 Cal.4th 497 (1996).
 26 (Lodgment No. 1 at 282.) Petitioner's speculation that the court didn't read the motion
 27 is not supported by the record. (See Transcript from March 16, 2010 Sentencing
 28 Hearing, Lodgment No. 2 at 1444 ("I've read the motion to strike the prior with all the

1 letters that are attached.”)) Although the court denied the Romero motion, and imposed
 2 a hefty sentence under the three strikes law, counsel nonetheless met his obligation to
 3 defend Petitioner at the sentencing. Petitioner has not shown that his counsel’s
 4 performance was deficient or that he was prejudiced under *Strickland*.

5 Based on an independent review of the record, the Court finds the California
 6 Supreme Court’s denial of this claim was not contrary to, or an unreasonable
 7 application of, clearly established Federal law. Accordingly, the Court recommends
 8 that Petitioner’s claim in ground four regarding sentencing be **DENIED**.

9 **III. CONCLUSION AND RECOMMENDATION**

10 The Court submits this Report and Recommendation to United States District
 11 Judge Roger T. Benitez under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the
 12 United States District Court for the Southern District of California. For all the
 13 foregoing reasons, **IT IS RECOMMENDED** this habeas Petition be **DENIED** on the
 14 grounds that Petitioner is not in custody in violation of any federal right. **IT IS**
 15 **FURTHER RECOMMENDED** the Court issue an Order (1) approving and adopting
 16 this Report and Recommendation and (2) directing that judgment be entered denying
 17 the Petition.

18 **IT IS HEREBY ORDERED** no later than **May 29, 2013**, any party to this action
 19 may file written objections with the Court and serve a copy on all parties. The
 20 document should be captioned “Objections to Report and Recommendation.”

21 **IT IS FURTHER ORDERED** any Reply to the Objections shall be filed with
 22 the Court and served on all parties no later than fourteen (14) days from service of
 23 Petitioner’s filed Objections. The parties are advised that failure to file objections
 24 within the specified time may waive the right to raise those objections on appeal of the
 25 Court’s Order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v.*
 26 *Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

27 DATED: April 29, 2013

28 
 DAVID H. BARTICK
 United States Magistrate Judge